PRIVY COUNCIL REPORTS

RAJA'S COMMERCIAL COLLEGE v. GIAN SINGH & COMPANY LTD.

[P.C. (Lord Diplock, Lord Simon of Glaisdale and Lord Fraser of Tullybelton) April 27, 1976]
[Privy Council Appeal No. 14 of 1975]

Landlord and Tenant — Tenancy determined by notice to quit — Tenant holding over after notice to quit — Mesne profits — Whether damages awarded should take account of tax liability of landlord if he had received amount as rent — Whether mesne profits liable to tax — Whether capital or income — Income Tax Act (Cap. 141) s. 10(1).

Income Tax — Mesne profits liable to tax — Income Tax Act (Cap. 141), s. 10(1).

In this case the respondents had obtained an order of possession against the appellants and the High Court had ordered the appellants to pay mesne profits from the date of the expiry of the notice to quit to the date of delivery of possession. The appellants appealed to the Court of Appeal and contended that the damages awarded should not have been the full amount of rent lost by the respondents but rather the amount less income tax which the respondents would have had to pay on the rent. The Court of Appeal rejected the appellants' contention and held ([1975] 1 M.L.J. 54) that the mesne profits would be taxable under section 10(1)(f) of the Income Tax Act as "any other profits arising from property". The appellants appealed to the Privy Council.

Held, dismissing the appeal: the mesne profits as they were damages which came in place of lost income fell to be treated as income for income tax purposes and it was immaterial whether the respondents were traders or investors. Accordingly there was no reason for the damages awarded to the respondent to be reduced in this case.

Cases referred to:-

(1) *British Transport Commission* v. *Gourley* [1956] A.C. 185.

(2) *Simpson* v. *Bonner Maurice's Executors* (1929) 14 T.C. 580, 592.

(3) *Riches* v. *Westminster Bank Ltd.* [1947] A.C. 390, 394.

(4) *London and Thames Haven Oil Wharves Ltd.* v. *Attwooll* [1967] Ch. 772.

(5) *Burmah Steam Ship Company Ltd.* v. *I.R.C.* 1931 S.C. 156.

(6) *The National Bank of Wales* [1899] 2 Ch. 629, 650.

(7) *Spence* v. *C.I.R.* (1941) 24 T.C. 311, 318.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Andrew Park for the appellants.

J. E. Holroyd Pearce for the respondents.

Lord Frazer of Tullybelton (delivering the judgment of the Board): This is an appeal from the Court of Appeal in Singapore. It raises a question as to the basis on which damages should be assessed. The respondents were the owners of a large building at 30-31 Raffles Place, Singapore. The appellants were the tenants of premises in the building from 1957 for several years. The respondents gave the appellants a notice to quit dated November 30, 1967 determining the appellants' tenancy at December 31, 1967. The appellants disputed the effectiveness of the notice to quit and claimed to be entitled to remain in occupation under the Control of Rent Ordinance. The respondents maintained that the Ordinance did not apply and raised an action against the appellants claiming possession of the premises and damages. That action was tried by Choor Singh J., the main issue at the trial being whether the Control of Rent Ordinance applied. The learned judge held that it did not and he therefore made an Order dated November 22, 1973 in favour of the respondents for possession and for damages. The appellants gave notice of appeal against the whole decision, but they soon abandoned the appeal against the order for possession and vacated the premises on November 30, 1973. They went on with their appeal against the award of damages but the Court of Appeal dismissed their appeal.

It will be apparent from the foregoing summary of the facts that the appellants were in occupation of the premises as trespassers from January 1, 1968 until November 30, 1973, that is for five years eleven months. There is no doubt that the respondents are entitled to damages for the trespass. The appellants accept that, and they accept also that the measure of damages must be based on the difference between the actual rent which the respondents have (apparently) been paid by the appellants at $0.75 per square foot per month and the higher rent which they admittedly could have obtained if the appellants had moved out at December 31, 1976 so that the respondents could have relet the premises to another tenant.

In the appeal to the Board the appellants sought to raise two objections to the amount of damages awarded which they said had been assessed at too high a figure. One of the objections (in paragraph 10 of the printed case of the appellants) related to the amount of rent which the learned judge held could have been obtained by the respondents if they had relet the premises. Evidence on this matter was led on behalf of the respondents but there was no counter evidence for the appellants. The respondents' evidence was accepted by the learned judge who drew from it certain inferences. In the appellants' Petition of Appeal to the Court of Appeal at paragraphs 4 (4) and (5) they submitted that the learned judge had failed to appreciate the true significance of the respondents' evidence on this matter and that he had erred in law in holding that he had no alternative but to accept what he thought the evidence meant. But the point is not mentioned in the judgment of the Court of Appeal and their Lordships infer that it cannot have bulked significantly in the argument before them, if indeed it was raised at all. In any event their Lordships consider that the appellants' contention on this point lacks the basis in fact without which it depends on mere speculation. It was not raised at the trial either in evidence on behalf of the appellants or by cross-examination of the respondents' witnesses, nor apparently in the submissions to the judge, and their Lordships declined to allow the appellants to raise the point before the Board.

The appellants' main ground of objection to the damages awarded was that they should not have been the full amount of the rent lost by the respondents (whatever that amount may have been) but rather that amount, less the income tax which the respondents would have had to pay on the rent. The reason is that according to the appellants, the respondents will not be liable to pay income tax on the damages when they are received. The appellants relied on the basic principle laid down in the case of *British Transport*

Commission v. *Gourley*[1] which, as applied to this case, was that, if the rent would have been taxable but the damages are not, then the damages should be reduced to reflect the tax saving to the respondents; if, however, the damages are themselves taxable they do not fall to be reduced on this account. The issue between the parties accordingly is whether the damages are taxable. The appellants contend that they are not and that therefore they should be reduced in amount; the respondents contend that they are. This issue was not raised before the learned judge but it was argued before the Court of Appeal who rejected the appellants' contention. The Court of Appeal held that the damages would be taxable.

Liability to tax depends upon the effect of the (Singapore) Income Tax Act section 10 the material part of which is as follows:

"10. (1) Income tax shall, subject to the provisions of this Act, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from Singapore or received in Singapore from outside Singapore in respect of—

....

(f) rents, royalties, premiums and any other profits arising from property;".

The Court of Appeal disposed of this point very briefly in one sentence thus—

"In our opinion, it is clear that the damages awarded in the present case undoubtedly fall within the expression 'and any other profits arising from property' in section 10(1)(f)."

Their Lordships agree with the expression of opinion, so far as it goes, and they did not understand that it was disputed on behalf of the appellants. But it does not touch the prior, and more difficult, question of whether the damages are income at all. That question does not appear to have been considered by the Court of Appeal. The first part of section 10(1) cited above provides that income tax shall be payable "upon the income of any person" and the profits arising from property are liable to income tax only if they are income. Clearly profits arising from property might be, and often are, of a capital nature and profits of that sort will not be liable to income tax.

Questions of whether sums awarded by courts are income, liable to income tax, or not, have arisen in a number of reported cases. The names given to the sums awarded have varied: "damages" "interest" "compensation" have all been used, but the court has declined to be bound by the label and has always tried to look through it and "to solve the question of substance" in the words of Rowlatt J. in *Simpson* v. *Bonner Maurice's Executors*[2] by reference to the true character of the award. Unfortunately the tests applied by the courts for judging the true character have not always been stated in the same way and their Lordships therefore find it necessary to examine the facts of certain cases in some detail. It is unsatisfactory that this issue has to be contested between two private litigants in the absence of the Revenue Authorities who have a vital interest in the result, but that has been a feature of many of the cases in this branch of the law and has been commented upon by the courts in several of them — see *Riches* v. *Westminster Bank Ltd.*[3]

The most recent case which was brought to the notice of their Lordships was *London and Thames Haven Oil Wharves Ltd.* v. *Attwooll*[4] in which the plaintiffs were the owners of a jetty which had been struck and damaged by a ship. The plaintiffs recovered damages which were divided into two parts. One part was compensation for the physical damage to the jetty and there was no dispute that that was capital and not liable to income tax. The question arose as to the second part which was received in respect of consequential loss owing to the jetty having been out of use for about a year. The Inland Revenue claimed income tax upon that part and the plaintiffs resisted the claim. The Court of Appeal held that this part of the damages fell to be treated as a taxable revenue receipt and Diplock L.J. (as he then was) began his opinion at page 815 thus:

"The question whether a sum of money received by a trader ought to be taken into account in computing the profits or gains arising in any year from his trade is one which ought to be susceptible of solution by applying rational criteria. And so I think it is. I see nothing in expereince as embalmed in the authorities to convince me that this question of law, even though it is fiscal law, cannot be solved by logic, and that, with some temerity, is what I propose to try to do.

I start by formulating what I believe to be the relevant rule. Where, pursuant to a legal right, a trader receives from another person compensation for the trader's failure to receive a sum of money which, if it had been received, would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the time when the compensation is so received, the compensation is to be treated for income tax purposes in the same way as that sum of money would have been treated if it had been received, instead of the compensation.

The rule is applicable whatever the source of the legal right of the trader to recover the compensation. It may arise from a primary obligation under a contract, such as a contract of insurance, from a secondary obligation arising out of non performance of a contract, such as a right to damages, either liquidated, as under the demurrage clause in a charterparty, or unliquidated, from an obligation to pay damages for tort, as in the present case, from a statutory obligation, or in any other way in which legal obligations arise."

That statement of the relevant rule appears to their Lordships to be sound in principle and in accordance with earlier authorities. It will be enough to refer to two of these authorities. In *Burmah Steam Ship Company Limited* v. *I.R.C.*[5] shipowners had recovered damages from repairers of a ship who had failed to complete her overhaul within the stipulated time, and the damages were assessed by reference to the estimated profits which the ship would have earned had she been trading during the excess time taken for the overhaul. It was held that the damages were income for the purposes of income tax. Lord President Clyde said this at page 159:

"Suppose someone who chartered one of the appellants' vessels breached the charter, and exposed himself to a claim of damages at the appellants' instance; there could, I imagine, be no doubt that the damages recovered would properly enter the appellants' profit and loss account for the year. The reason would be that the breach of the charter was an injury inflicted on the appellants' trading, making (so to speak) a hole in the appellants' profits, and the damages recovered could not therefore be reasonably or appropriately put by the appellants — in accordance with the principles of sound commercial accounting — to any other purpose than to fill that hole. Suppose, on the other hand, that one of appellants' vessels was negligently run down and sunk by a vessel belonging to some other shipowner, and the appellants recovered as damages the value of the sunken vessel. I imagine

that there could be no doubt that the damages so recovered could not enter the appellants' profit and loss account; because the destruction of the vessel would be an injury inflicted, not on the appellants' trading, but on the capital assets of the appellants' trade, making (so to speak) a hole in *them;* and the damages could therefore — on the same principles as before — only be used to fill *that* hole."

The second of the earlier authorities to which it is appropriate to refer is *Riches* v. *Westminster Bank Ltd.*[3] where it was held that a sum of money awarded under the Law Reform (Miscellaneous Provisions) Act 1934 as "interest" on damages was "interest of money" within the meaning of Schedule D of the (United Kingdom) Income Tax Act 1918 and was taxable as income. Viscount Simon said at page 396 this:

"The real question, for the purpose of deciding whether the Income Tax Acts apply, is whether the added sum is capital or income, not whether the sum is damages or interest."

Lord Simonds at page 406 said this:

"I come then to the second stage and ask what is the character of investment allowed under section 28 of the [Civil Procedure] Act of 1833. Here the argument is that, call it interest or what you will, it is damages, and, if it is damages, then it is not 'interest in the proper sense' or 'interest proper', expressions heard many times by your Lordships. This argument appears to me fallacious. It assumes an incompatibility between the ideas of interest and damages for which I see no justification. It confuses the character of a sum paid with the authority under which it is paid. Its essential character may be the same, whether it is paid under the compulsion of a contract, a statute or a judgment of the court. In the first case it may be called 'interest' and in the second and third cases 'damages in the nature of interest', or even 'damages'. But the real question is still what is its intrinsic character, and in the consideration of this question a description due to the authority under which it is paid may well mislead."

If the rule laid down in these cases is applicable to the present case, there can be no doubt that the damages here are income and fall to be taken into account as such in assessing the respondents' liability to income tax. Their Lordships can see no relevant distinction between the Income Tax Act of Singapore and the United Kingdom legislation which governed liability to income tax in the cases to which reference has just been made, nor was any such distinction suggested in argument. The damages here were applicable to the purpose of filling the hole in the respondents' income caused by the fact that they were not able to obtain as much rent for the premises as they could have obtained if the appellants had not been in occupation as trespassers. So much was conceded by Mr. Park on behalf of the appellants. But he maintained that the rule laid down in these cases was only applicable to damages awarded to a trader and that it had no application to damages awarded to investors, a class which he said included the respondents. Their Lordships recognise that for some purposes in connection with income tax there may be a distinction between traders and investors and they are willing to assume that the respondents are investors for this purpose. But their Lordships are unable to see any reason of logic or principle why this distinction should be relevant to the question whether awards of damages are liable to income tax or not. There seems to be no reason why their treatment for tax purposes should depend upon whether the recipient is a trader or an investor, rather than upon the essential character of the damages themselves.

The foundation of Mr. Park's argument for the appellants was the case of *Simpson* v. *Bonner Maurice's Executors, supra* which was relied upon by him as an authority for the proposition that where an award for damages is made to an investor (as distinct from a trader) an award calculated on the basis of interest, but not being interest as such, was not taxable as income. If that principle is applicable to the present case clearly the respondents will not be liable for income tax on the damages in question here. The case of *Bonner Maurice* arose out of the war of 1914-1918. At the outbreak of the war a British subject domiciled and ordinarily resident in the United Kingdom owned some German stocks and shares which were deposited in banks in Germany and the dividends and interest on which were collected by the banks. During the war it was of course impossible for the money to be sent from Germany to the United Kingdom and dividends and interest therefore accumulated in the German banks. In 1917 the German Government appointed an official called the Treuhänder, corresponding to the Custodian of Enemy Property in the United Kingdom, and certain of the dividends and interest were paid over to him by the banks. After the war the sums were recovered by the representatives of the original owner (who had died) under the provisions of the Treaty of Versailles and in addition the respondents received certain sums under Article 297(e) of the Treaty which provided that nationals of the Allied and Associated Powers should be entitled to "compensation in respect of damage or injury inflicted upon their property, rights or interests" in Germany. This compensation was awarded by an Anglo-German mixed arbitration tribunal and was calculated upon the basis of interest at 5% on the sums handed over to the Treuhänder. A feature of the case was that the principal sum, and presumably also the compensation, was recovered in sterling converted from marks at the pre-war rate of exchange. Rowlatt J. held that the "compensation" was not income and his decision was upheld by the Court of Appeal. The reasoning of Rowlatt J. appears from the following passage in his judgment at pages 592/3:

"The Treuhänder did not receive this money subject to any liability to hold it at interest. No doubt the German law recognised it as remaining the property of [the British national], but not so as to bear interest. The Treaty did not give [the British national] any right to interest, nor did it declare the Treuhänder a trustee so as to found any consequential claim for interest; it did not empower the Tribunal to give interest as such, or to make any declaration as to the character of the purpose for which the Treuhänder had held the money. The Treaty gave compensation, and the Tribunal which assessed the principal sum has assessed it on the basis of interest. I think this sum first came into existence by the Award, and no previous history or anterior character can be attributed to it. It is exactly like damages for detention of a chattel, and unless it can be said that damages for detention of a chattel can be called rent or hire for the chattel during the period of detention, I no not think this compensation can be called interest."

The last sentence of that passage is no doubt quite accurate in relation to chattels which, if not detained, would have been used by the owner for his own purposes but it is not applicable to chattels which the owner would have let out on hire, for example a motor-car belonging to a car rental firm or a TV set owned by a rental company. In the Court of Appeal Lord Hanworth M.R. said that the compensation was

for preventing the British national from exercising the power of disposition over his property and the Master of the Rolls went on to say this (at page 602): "The way to estimate that compensation or damages — the sensible way no doubt — would be by calculating a sum in terms of what interest it would have earned. That has been done, but the sum that was paid has not been turned into interest so as to attach income tax to it. It remains compensation and, for these reasons, it appears to me that it is not a sum which attracts or attaches income tax to it." Lawrence L. J. took the same view and he rested his opinion partly on the fact that damages were paid in one lump sum and not by annual instalments. He cited with approval the decision of Wright J. in *The National Bank of Wales*[6] at 650, that in a case where a judgment had been pronounced for a lump sum with interest, the interest was in the nature of damages and not interest within the meaning of the Income Tax Acts. But the reasoning in the *National Bank of Wales* was held in *Riches* v. *Wesminster Bank, supra* to be erroneous, and it follows that the authority of this part of the opinion of Lawrence L. J. is to some extent weakened. Their Lordships have set out the facts in *Bonner Maurice* in some detail in order to show their very special and unusual nature. Notwithstanding these specialities the case was referred to and distinguished by Lord President Normand, as he then was, in *Spence* v. *C.I.R.*[7] thus:

"Of course, it is often necessary for a Court to estimate damages by reference to loss of income in a series of years, and when it does so the resulting amount of damages which is awarded to a successful party is a lump sum capital payment in place of income payments which he might have received annually. In the same way in a case to which we were referred, *Simpson* v. *Maurice's Executors*, a sum paid to a party by way of compensation under a peace treaty for something which he might have received but which he was prevented from receiving as income during a series of years was treated as a capital lump sum payment."

With the greatest respect their Lordships do not consider that a lump sum of damages, estimated by reference to lost income, is necessarily, or even usually, a capital payment, and if *Bonner Maurice* laid down any such proposition their Lordships would not be disposed to follow it. But they prefer to treat *Bonner Maurice* in the words of Viscount Simon in *Riches, supra* at page 397 as a case "of a very special character."

Several of the noble and learned Lords who were parties to the decision in *Riches* referred to the case of *Bonner Maurice*, but none of them suggested that it was to be distinguished by reason of the fact that the recipient of the award was an investor and not a trader. Accordingly their Lordships are of opinion that, for the purposes of this appeal, it is immaterial whether the respondents are traders or investors, and that the damages which come in place of lost income, fall to be treated as income for income tax purposes.

For these reasons their Lordships are of opinion that the Court of Appeal came to the correct decision in the present cases and the appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Parker, Garrett & Co.; Coward Chance.*

REGISTRAR OF TITLES, JOHORE v. TEMENGGONG SECURITIES LTD.

[P.C. (Lord Diplock, Lord Morris of Borth-Y-Gest, Lord Hailsham of St. Marylebone, Lord Simon of Glaisdale and Lord Fraser of Tullybelton) April 27, 1976]

[Privy Council Appeal No. 38 of 1975]

Land Law — Registrar's caveat — Whether rightly and properly entered — Claim by Government for income tax duly assessed — Unsecured civil debt giving rise to no legal rights in or over property of debtor — Mere personal claim — Not interest of Federation — National Land Code, s. 320.

This was an appeal from the decision of the Federal Court ([1974] 2 M.L.J. 45), which held that the Registrar's caveat was wrongly entered against the land. The short facts were that the Li-Ta Company was the registered proprietor of land in Johore. It was indebted to the Federation Government for income tax which was overdue. On August 30, 1972 it entered into an agreement with the respondents for the sale of its land to the respondents. The sale was completed on September 22, 1972 when the purchase price was satisfied by the issue of shares to the Li-Ta Company. In the meantime the Revenue department had learned that Li-Ta Company was proposing to sell its land at Johore. It had started an action for recovery of the tax on September 24, 1972. On October 2, 1972 the Department of Inland Revenue wrote a letter to the Registrar of Land Titles requesting him to enter a Registrar's caveat in respect of the land and this was done on October 11, 1972. When the application for transfer of title to the respondents and other documents were presented for registration, the Registrar rejected them on the ground that they were prohibited by the entry of Registrar's caveat. The respondents thereupon applied to the High Court for an order directing the Registrar to cancel the Registrar's caveat and to register the documents. This application was dismissed by the High Court upon the ground that the claim of the Federation to recover overdue income tax from Li-Ta Company was an interest of the Federation entitled to protection by a Registrar's caveat. Upon appeal to the Federal Court, the court allowed the appeal and directed the Registrar to enter upon the register the documents presented. The Registrar of Titles thereupon appealed to the Privy Council.

Held, dismissing the appeal: (1) although Malaysian income tax became due and payable by the taxpayer to the Federation upon notice of assessment its legal nature was that of an unsecured civil debt. Until it was converted into a judgment by the recovery of judgment in an action, the unsecured civil debt gave rise to no legal rights in or over any property of the taxpayer nor to any remedies against the taxpayer's property. It was a mere personal claim against him and did not come within the meaning of "interest" in section 320(1) of the National Land Code;

(2) the interests which the Registrar of Titles was empowered to protect under section 320(1)(b) were confined to interests in the land that were recognised by the Land Code as being either registrable or otherwise entitled to protection. An unsecured creditor of the proprietor of the land had no such interest in the land;

(3) even if no contract of sale by Li-Ta Company to the respondents had been in existence at the time, the Registrar of Titles would not have been empowered by section 320(1) of the National Land Code to enter any Registrar's caveat in respect of the land upon the information available to him.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Patrick Medd Q.C. (*Hon. Christopher Bathurst* and *Mohamed Nizar bin Idris* with him) for the appellants.

Gerald Godfrey Q.C. (*John Chadwick* and *Wong Kim Fatt* with him) for the respondents.

Lord Diplock (delivering the judgment of the Board): The facts which give rise to this appeal can be stated briefly.